TO: The Dane County Juvenile Judges

FROM: Attorney Ben Gonring

RE: A Proposal to Develop a Shackling Policy in Juvenile Court

DATE: February 28, 2014

Having practiced in Dane County Juvenile Court since the summer of 1995, I am acutely aware that our system lacks a judicial policy on shackling. The Policy and Procedure Manual makes no mention of it. I have not heard it discussed at any Juvenile Judges' meetings, at least not since I became the manager of my unit and began attending the meetings with regularity. Indeed, the only thing that I can say with certainty is that, in my experience, every juvenile in secure custody enters the courtroom in shackles, is made to sit through the entire hearing in shackles, and departs the same way. I am led to believe that this is based solely on the policy/desire of the Sheriff's Department. While in her time as juvenile judge, The Honorable Moria Krueger would routinely make the bailiffs remove those shackles while the juvenile was in her courtroom, I cannot recall any other Judge who has elected to question or in any way modify this practice of indiscriminate shackling.

As indicated at the January Judges' meeting, I am reading, with increased regularity, of successes by the defense bar in challenging indiscriminate shackling. Indeed, the National Juvenile Defender Center's recently issued "National Juvenile Defense Standards" talk about the need for counsel to advocate both in and outside the courtroom for such changes, noting "counsel should strive to ensure that the system in which he or she represents young clients provides a fair and formal tribunal that abides by constitutional, statutory and ethical mandates."[1] Because our current practice of indiscriminate shackling runs afoul of both constitutional and ethical/philosophical mandates, it is time for the Juvenile Court in this county to develop a policy whereby there is a judicial determination, in each and every case, regarding the specific need for shackles for that particular juvenile, during that particular hearing, on that particular day.

Constitutional Underpinnings from the Adult Criminal Courts

It is beyond debate that courts of criminal jurisdiction must recognize the constitutional concerns attendant to the shackling of defendants in fact-finding hearings. Those of you who have presided over cases in the criminal rotation have likely experienced this issue. Both our state courts and the United States Supreme Court have clearly indicated the need, arising out of principles of Due Process, for an individualized assessment by the trial judge regarding the use of shackles in adult criminal trials.

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[1] National Juvenile Defender Center, National Juvenile Defense Standards, 2012, at p. 152.

Wisconsin Courts have, for decades, been aware of the concerns associated with defendants appearing in shackles in front of a jury. In an oft-cited opinion, our state Supreme Court noted almost 50 years ago:

> It is the general rule that under ordinary circumstances freedom from handcuffs, shackles, or manacles of a defendant during the trial of a criminal case is an important component of a fair and impartial trial. In other words, such procedure should not be permitted except to prevent the escape of the accused, to prevent him from injuring others, and to maintain a quiet and peaceable trial.

Sparkman v. State, 27 Wis. 2d 92, 96-97 (1965). This sentiment was repeated by the Court four years later, indicating, "[a] criminal defendant is entitled to not only a fair trial, but the appearance of a fair trial, and restraint not necessary to maintain order, decorum, and safety in the courtroom is violative of that principle." Flowers v. State, 43 Wis. 2d 352, 362 (1969).

Beyond recognizing the principles involved, however, the Court's words about the trial judge being the arbiter are of great significance to this specific issue. The Court noted, "It is for the trial court rather than the police to determine whether such caution is necessary to prevent violence or escape." Sparkman, at 96. Further, "[a] trial judge, of course, should not order a defendant restrained unless he has in fact exercised his discretion and set forth his reasons in the record." Flowers, at 363. Finally, and succinctly, it was found to be an erroneous exercise of discretion by the trial court when it "did not consider factors beyond the sheriff's department policy on shackling defendants as a basis for placing restraints on [the defendant]." State v. Grinder, 190 Wis. 2d 541, 552 (1995).

The Constitutional implications of this question were highlighted by the United States Supreme Court in Deck v. Missouri, 544 U.S. 622 (2005). Writing for the majority, Justice Breyer traced the history of the rule against shackling, starting with W. Blackstone's "Commentaries on the Laws of England" (1769). Deck, at 626. The majority ultimately concluded that this history reflects "a basic element of 'due process of law' protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Id., at 629.

More important for this specific discussion, however, is Breyer's explanation of why shackling should be limited. He notes that such a policy "giv[es] effect to three fundamental legal principles." Id., at 630. "First, the criminal process presumes that the defendant is innocent until proved guilty. … [and] Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." Id. (internal cites omitted). "Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. … [and] Shackles can interfere with the accused's 'ability to communicate' with his lawyer." Id., at 631 (internal cites omitted). "Third, judges must seek to maintain a judicial process that is a dignified

process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue…. [and] the use of shackles at trial 'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" Id. (internal cites omitted). While we are not talking in juvenile court about a trial to a jury, these principles are still applicable to the discussion of indiscriminate shackling and will guide the argument that follows.

The Application of these Principles to Juvenile Court
a. Other State Courts

Having established that there are Constitutional concerns about what process is due adult defendants vis-à-vis the use of shackles, and the particular importance of a judicial determination regarding the same, I now turn my attention to juvenile court proceedings. Courts in other jurisdictions have examined the issue and found that the principles cited above apply with equal force in the context of juvenile proceedings.[2]

1. Illinois

The Supreme Court of Illinois appears to have been the first to tackle this topic. In re Staley involved a fifteen year-old brought before the Juvenile Court from the detention home in handcuffs. 67 Ill.2d 33 (1977) [ATTACHED]. The juvenile's counsel asked for the handcuffs to be removed during the proceeding and the trial court refused. Counsel again asked for the cuffs to be removed at the adjudicatory hearing held 10 days later and the trial court refused. While conceding that this was not a case which dealt with the possible prejudice attendant to a jury viewing the shackles, the Court noted:

> The possibility of prejudicing a jury, however, is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity to do so. The presumption of innocence is central to our administration of criminal justice. In the absence of exceptional circumstances, an accused has the right to stand trial 'with the appearance, dignity, and self-respect of a free and innocent man….' It jeopardizes the presumption's value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged.

In affirming the appellate court's decision that the trial court erred, the Court explicitly rejected the State's argument that "poor security" in the courtroom was a sufficient justification, noting "there is nothing in the record to show that the defendant posed a threat of escape." The Court concluded, "Physical restraints should not be permitted unless there is a clear necessity for them."

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[2] I did not feel it "worthy" of being included in the body of this memo, but a decision by the Vermont Supreme Court is consistent with this section. In ruling that the trial court's order calling for the removal of shackles *during transport* exceeded the court's authority, it, nonetheless affirmed, "The juvenile court has the authority to proscribe the use of restraints on the juveniles while they are on courthouse premises." In re B.F., 595 A.2d 280 (1991). [ATTACHED]

2. Oregon

The Court of Appeals in Oregon reached a similar result in State ex rel. Juvenile Dept. of Multnomah County v. Millican, 138 Or. App. 142 (1995) [ATTACHED]. There, counsel asked the trial court to remove the leg chains from his client during the "delinquency hearing." It appears that the use of said chains was pursuant to the policy of the sheriff's officers for bringing kids to court from the detention center. Much like the Court in Staley, the Court noted that, "Although most often invoked as a safeguard against potential jury prejudice, the right to stand trial unshackled also insures that defendants may face the court 'with the appearance, dignity and self-respect of a free and innocent [person].'" The Court agreed that "juveniles have the same rights as adult defendants to appear free from physical restraints," ultimately citing the seminal case of Gault for the proposition that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In addition to citing the demand that "free consultation with counsel" not be inhibited, the Court noted, "the right to remain unshackled during juvenile proceedings is **consonant with the rehabilitative purposes** of Oregon's juvenile justice system…. Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process." (emphasis added)

3. North Dakota

The Supreme Court of North Dakota applied the same principles and reached the same conclusions in In re R.W.S., 728 N.W.2d 326 (2007) [ATTACHED]. There, counsel asked at the hearing for handcuffs to be removed and the judicial court referee replied that it was "a matter to be determined by the sheriff's office since they're responsible for security." The Supreme Court looked at Deck, Staley and Millican and concluded that "the juvenile court had a duty to exercise its discretion when [the juvenile] requested that his handcuffs be removed during his adjudicatory hearing. The referee violated [the juvenile's] due process right to a fair trial when he failed to exercise his discretion and deferred to law enforcement." Despite ultimately finding the error to be harmless, the Court, nonetheless, laid out the proper factors for the trial court's consideration: "the accused's record, temperament, and the desperateness of his situation; the security situation at the courtroom and the courthouse; the accused's physical condition; and whether there was an adequate means of providing security that was less prejudicial."

4. California

Finally, the California Court of Appeals took on this question in Tiffany A. v. Superior Court of Los Angeles County, 150 Cal.App.4th 1344 (2007) [ATTACHED]. There, counsel asked for a blanket order that all of her clients be allowed to appear free of restraints absent an individualized determination of the need for the same. In overruling the trial court's denial, the Court concluded, "any decision to shackle a minor who appears in the Juvenile Delinquency Court for a court proceeding must be based on the non-conforming conduct and behavior of that individual minor. Moreover, the decision

to shackle a minor must be made on a case-by-case basis." Further, the use of shackles cannot be justified "solely on the inadequacy of the courtroom facilities or the lack of available security personnel to monitor them." Finally, the Court notes: "[A]ll juvenile proceedings must contain essentials of due process and fair treatment. In our view, the constitutional presumption of innocence, the right to present and participate in the defense, the interest in maintaining human dignity and the respect for the entire judicial system, are among these essentials whether the accused is 41 or 14." The final statement of the Court, to me, sums up this entire issue most succinctly:

"While we are sympathetic to the obligations and responsibility our conclusion may impose upon the juvenile delinquency court, the Sheriff's Department and the People, **those pale in comparison to the values we uphold**." (emphasis added)

b. Other State's Legislative Changes, Rules Amendments and Agreements

The values which the California Court sought to uphold were a similar impetus for like results across the country in the form of legislative changes, amendments to rules and specific agreements between the Court and parties. Looking at what has transpired in North Carolina, Florida, Massachusetts, Pennsylvania and, most recently, Delaware, is instructive to this discussion.

1. North Carolina

The state of North Carolina provides a great example of implementing statewide change through legislation. In deciding that there ought to be a procedure by which trial courts could make a decision regarding the use of restraints in juvenile court, lawmakers there, in 2007, created a new section of the law: § 7B-2402.1. [ATTACHED] As enacted, there is a presumption against shackling, indicating that restraints can be used only "when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom."

2. Florida

In 2009, the Supreme Court of the State of Florida heard contested oral arguments before ordering an amendment to the Florida Rules of Juvenile Procedure. In its decision [ATTACHED] which authorized the proposed change, the Court used strong language in finding "the indiscriminate shackling of children in Florida courtrooms … **repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice** …." (emphasis added) The resulting amendment [ATTACHED] makes clear that any instrument of restraint must be removed prior to the court appearance unless the court finds both that:

"(1) the use of restraint is necessary due to one of the following factors:

(a) instruments of restraint are necessary to prevent physical harm to the child or another person,

(b) the child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm to himself or herself or others as evidenced by recent behavior, or

(c) there is a founded belief that the child presents a substantial risk of flight from the courtroom, and

(2) there are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs."

3. Massachusetts

In 2010, the Administrative Office of the Juvenile Court for the Commonwealth of Massachusetts announced a statewide amendment to the "Court Officers Policy and Procedure Manual." As the accompanying memo from the Chief Justice indicates [ATTACHED], the amendment "creates a presumption that restraints will be removed from juveniles while appearing in a courtroom before a justice of the Juvenile Court…." The policy itself [ATTACHED] provides guidance in the form of nine distinct factors which the presiding justice shall consider in evaluating the necessity of restraints:

(a) the seriousness of the present charge (supporting a concern that the juvenile had an incentive to attempt to escape);

(b) the criminal history of the juvenile;

(c) any past disruptive courtroom behavior by the juvenile;

(d) any past behavior that the juvenile presented a threat to his or her own safety, or the safety of other people;

(e) any present behavior that the juvenile represents a current threat to his or her own safety, or the safety of other people in the courtroom;

(f) any past escapes, or attempted escapes;

(g) risk of flight from the courtroom;

(h) any threats of harm to others, or threats to cause a disturbance, and

(i) the security situation in the courtroom and courthouse, including risk of gang violence, or attempted revenge by others.

Of significance to our discussion is the justification listed in the "Commentary":

"Shackling of juveniles in courtroom proceedings is **antithetical to the Juvenile Court goals of rehabilitation and treatment**." (emphasis added)

4. Pennsylvania

The Supreme Court of Pennsylvania also adopted a new rule of procedure involving its state's juvenile courts. In its "Explanatory Report," [ATTACHED] the Court makes clear that the rule is meant to "eliminate shackling during a court proceeding in almost every case. Only in a few extreme cases should such restraints be utilized." The rule itself, adopted in 2011 [ATTACHED], calls for the removal of all restraints prior to the hearing unless the Court determines on the record that such restraints are necessary in order to prevent:

1. physical harm to the juvenile or another person;

2. disruptive courtroom behavior, evidenced by a history of behavior that created potentially harmful situations or presented substantial risk of physical harm; or

3. the juvenile, evidenced by an escape history or other relevant factors, from fleeing the courtroom.

Again, the philosophical underpinnings are of significance to this discussion, as the Court proclaims:

"The routine use of restraints on juveniles is a practice **contrary to the philosophy of balanced and restorative justice and undermines the goals of providing treatment, supervision, and rehabilitation to juveniles.**" (emphasis added)[3]

5. Delaware

A very recent example of what I am looking for here in Dane County comes in the form of a "Memorandum of Agreement" [ATTACHED] entered into in October of 2013 by the Delaware Family Court, the Department, and the Office of the Public Defender. It establishes a pilot program in New Castle County, effective November 2013, by which all restraints shall be removed from a detained juvenile prior to the beginning of a delinquency proceeding unless the court determines on the record that "restraints are necessary and no less restrictive alternative is available." With regarding to the necessity of restraints, the agreement notes that the Court must make a finding that at least one of four factors exists:

1. The juvenile is presently uncontrollable and constitutes a serious and evident danger to him/or herself or others;

[3] It is worth noting that the Pennsylvania legislature ultimately codified this rule in 2012, creating new subsection 42 Pa.C.S.A. § 6336.2.

2. There are safety risks for the youth or staff in the court room, including but not limited to the presence of known gang associates, or other individuals including relatives, who could pose a risk to youth and staff;

3. Written documentation of the youth's history of non-compliance with law enforcement, court security and [Department] staff, including but not limited to evidence of prior attempts to escape custody or other relevant factors; or

4. Written documentation of the youth's behavior at the detention facility.

c. Other individual judges/jurisdictions

In addition to the above discussion about changes effectuated by state courts, state legislatures and even joint agreements, there are also recent examples of individual County Courts/Judges electing to boldly put an end to the practice of indiscriminate shackling.

1. County of Dona Ana, New Mexico

In September of 2007, the Third Judicial District Court, County of Dona Ana, New Mexico, on its own motion, entered what it called a "temporary emergency order" regarding the use of physical restraints in juvenile court. Signed by Chief Judge Robert Robles, the order [ATTACHED] prohibits children who are in the custody of the County's Juvenile Detention Center from being restrained in the courtroom unless "ordered in advance by the Court based on an individualized determination of need." It establishes a procedure by which the State must file an application with the assigned judge, containing specific sworn allegations to "establish reasonable grounds to believe that the Child, if not restrained, will pose a particular threat to the safety of himself or others in the Courtroom, would be likely to attempt escape, or would present some other security risk."

2. Yamhill Couty, Oregon

In 2011, the Presiding Judge of the 25th Judicial District in Oregon, responding to issues arising out of a particular motion involving kids detained in the Yamhill County Juvenile Detention Center, wrote a letter to counsel detailing the court's decision. I have attached the pertinent portions of the decision (pages 1-11) relating to the issue of juveniles being shackled. As I am sure you will find, should you elect to read it, it is a very thoughtful analysis of the issue (including the issue of restraint during transport, something I am not, at this point, asking you to address). The court ultimately concludes (on p. 11) with a summary section in which it rules that, "Youth are not to be shackled in the matter presently practiced, while at counsel table participating in his or her case unless the court, in advance of the appearance in court at counsel table, has made a finding that the youth

presents a danger to him/herself or others or a risk of attempt to escape." The court then notes with approval the criteria laid out by Massachusetts, cited above.

3. Hamilton County, Ohio

In April 2013, Juvenile Court Judge Tracie Hunter[4] issued an order prohibiting indiscriminate shackling in her courtroom. As the attached article from the Cincinnati Herald describes it, the order calls for a procedure whereby any impacted party, including the Sheriff, may move the court, on a case-by-case basis, for the use of shackles. The general policy as announced, however, is that shackles will not be utilized unless "it is shown that the juvenile is a danger to him/herself, a danger to the public or at risk to attempt escape." The article further indicates the Court's belief that "the blanket policy of shackling juveniles is not in the best interest of children and contrary to evidence-based best practices."

Why not here?

What have been recognized by other jurisdictions are ideals that should resonate here. The notion that we should pay attention to the due process rights of juveniles and assure fairness in every hearing should not be open to debate. Nor should the bedrock principles that juvenile court is premised upon an individualized assessment, and designed primarily to identify and treat needs, rather than to punish. Indeed, within the Wisconsin Juvenile Justice Code's lists of "equally important purposes" of Chapter 938 one finds: "(c) to provide an individualized assessment of each alleged and adjudicated juvenile …;" "(d) to provide due process through which each juvenile offender and all other interested parties are assured fair hearings, during which constitutional and other legal rights are recognized and enforced;" and "(f) to respond to a juvenile offender's needs for care and treatment …." The indiscriminate use of shackles, without regard for either the relative need or its concomitant effect on the specific juvenile, runs afoul of these purposes.

Easily lost in the morass of generalized safety concerns is the fundamental idea that kids are different. As you have all heard me say many times in your respective courtrooms, the reasons that I and many others continue to do this work is that we believe in the power of our system to help effectuate change. We have an appreciation for the notion that kids' identities are still forming and can be redirected in a positive way. We know that the juveniles who appear in our courts make mistakes, sometimes serious and costly ones, but we also know that it would be wrong to equate the entirety of who they are and what they might become with those choices which bring them before us. Our entire system is geared toward promoting and building competencies – equipping children with the tools to succeed. Simply stated, we are driven by optimism, a view that with our guidance, these children can become the sort of productive members of society we all envision.

[4] I recognize that Judge Hunter was recently indicted, making her, perhaps, not "the best face" for this argument. I elected to include her order, however, as yet another example of what Judges are doing, across the country, to effectuate progressive and proper changes regarding this issue.

Handcuffing each child, each and every time they appear in court is antithetical to this belief. It perpetuates a notion that the child is bad, that he/she is dangerous, so much so that he/she cannot even sit next to a parent, lawyer or other trusted grown-up without being shackled. It reinforces negative self-esteem. It is humiliating and degrading. For some, it may even be traumatizing, as such confinement might trigger frightening flashbacks or emotions. We are constantly hearing about evidenced-based practices and providing trauma-informed care, but as presently constituted, our county's system of indiscriminate shackling provides no room for such recognition. It is time for that to change.

Dane County prides itself on being progressive and innovative. We have a very thorough and thoughtful Policy and Procedure Manual, covering almost every conceivable scenario with which we are confronted in juvenile court. As I hope this memo makes clear, however, we are now lagging behind the rest of the country on this very important topic. It is time for Judges to take back control of courtrooms and utilize some discretion. As the California Court properly said, regardless of the extra work it entails, it is time to uphold our values.